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No. 03-1619

In the Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

J. BRETT BUSBY
MAYER, BROWN, ROWE & MAW LLP
700 Louisiana Street
Houston, TX 77002
(713) 221-1651

PAUL M. TERRILL, III
Counsel of Record
VINCENT L. HAZEN
HAZEN & TERRILL, P.C.
810 W. 10th Street
Austin, TX 78701
(512) 474-9100

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Petitioners file this supplemental brief to address the impact of this Court's recent decision in *Gonzales* v. *Raich*, No. 03-1454 (June 6, 2005), on the questions presented by their petition. *Raich* leaves it as necessary as ever for this Court to decide whether the Commerce Clause permits the U.S. Fish & Wildlife Service to regulate "takes" of intrastate non-economic species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B).

Neither of the factors that foreclosed the Commerce Clause challenge in *Raich*—the "undisputed magnitude of the commercial market for [the regulated activity]" and the "findings in the [Act]" that the intrastate activity had a substantial effect on interstate commerce (slip op. 30)—is present here. Unlike in *Raich* and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), there is no market for intrastate non-economic cave insects, and such insects are not a substitute in any market for other endangered species. Thus, takes of the insects cannot be regulated on the ground that failure to do so would undercut congressional regulation of a national market for a fungible commodity. Nor do Congress's findings in the ESA provide any basis for concluding that takes of intrastate non-economic species substantially affect interstate commerce.

1. In *Raich*, the Court placed the facts of the case in a category it had already squarely addressed in *Wickard*. *Raich*, like *Wickard*, is a case where Congress sought to regulate "portions of [interstate] markets that are supplied with [products] produced and consumed locally." Slip op. 6. As in *Wickard*, the local activities being regulated were an integral "part of an economic 'class of activities'" that substantially affect interstate commerce (*id.* at 13)—local production and consumption of a single "fungible commodity for which there is an established * * * interstate market"—such that "failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 15.

In those circumstances, the intrastate activity at issue clearly affected "supply and demand" (slip op. 15) and "price and market conditions" (*id.* at 16) in the regulated interstate market. See *ibid.* (production for home consumption "has a substantial effect on supply and demand in the national market for that commodity"). In *Wickard*, consuming home-grown wheat weakened demand and therefore affected price controls in the national wheat market. 317 U.S. at 127-28. In *Raich*, the high demand for marijuana in the interstate market would predictably divert quantities of home-grown marijuana into that commercial market. Slip op. 16. For this reason, the Court held in both cases that the Commerce Clause authorized regulation of the home-grown commodity.

To describe this holding is to demonstrate why it is not controlling here. Unlike *Raich*, this is not a case where *Wickard*'s "[w]ell-settled law" supports federal regulation. *Raich*, slip op. 6. The cave insects have never been traded in commerce in any form or fashion—legally or illegally. Thus, the cave insects are not a "commodity" and there is no "national market" in them. Because no "supply and demand" or "price and market conditions" for cave insects exist, those conditions cannot be affected by intrastate activity. See Pet. 6. Nor does the activity prohibited by the challenged provision of the ESA—"takes" of cave insects—involve the "production, distribution, [or] consumption" of the protected insects. *Raich*, slip. op. 23.

Furthermore, cave insects are not a substitute for other creatures protected by the ESA in which there may be some market, and no "diversion" of insects into a commercial market is therefore plausible. See *Raich*, slip op. 16. Accordingly, the Court's concerns in *Raich* about the difficulty of defining the class of regulated activity are not present here. *Id.* at 23-30. Because endangered species taken together as a class are not a fungible "commodity," issues of substitution of one for another or of diversion into a commodity market are simply irrelevant to the analysis.

Given that cave insects are neither "articles or commerce" nor in any way related to any commercial market in endangered species, the principle in *Raich* that Congress may rationally prohibit "possession or manufacture of an article of commerce" as a "means of regulating commerce in that product" has no application here. *Raich*, slip op. 23. No amount of aggregating can turn these non-economic, non-commodity, non-fungible insects into part and parcel of an interstate market. Therefore, unlike in *Raich* or *Wickard*, there is no conceivable "rational basis" for concluding that takes of intrastate non-economic species, in the aggregate, substantially affect interstate commerce. *Id.* at 19.

2. Unlike the home-grown marijuana producers and users in *Raich*, Petitioners are not asking this Court to invalidate "'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Raich*, slip op. 22 (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)). It is easy to discern why regulating homegrown marijuana might be considered "an essential part of the larger regulatory scheme" governing Class I drugs. *Id.* at 24. As discussed above, marijuana is a commercial commodity, and "[p]rohibiting the intrastate possession and manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 23.

Here, in contrast, cave insects and other intrastate non-economic species are not a commodity. Takes of these species have no effect, direct or indirect, on the survival of species that live in more than one state and have economic value. Thus, federal inability to regulate takes of intrastate non-economic species would have no impact on the broader regulatory scheme of the ESA, and nothing in the ESA's congressional findings (discussed below) or in the record of this case suggests the contrary. Species that are properly protected under the ESA would continue to receive that protection in precisely the same manner and to precisely the same

degree.[1] Because regulating takes of cave insects has not been shown to be "essential" to the vitality of the ESA, such regulation is impermissible under the Commerce Clause.

3. For essentially the same reasons, prohibiting takes of intrastate non-economic species cannot be justified under the Necessary and Proper Clause: that prohibition is not "necessary to make a regulation of interstate commerce effective." *Raich*, slip op. 2 (Scalia, J., concurring in judgment). Neither Congress in the ESA nor the government in this litigation has plausibly suggested how regulation of economically valuable species "'could be undercut unless * * * intrastate'" non-economic species were also federally protected. *Id.* at 4 (quoting *Lopez*, 514 U.S. at 561). Nor have they explained how regulation of intrastate non-economic species is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.* at 5 (quoting *United States* v. *Darby*, 312 U.S. 100, 121 (1941)); see *id.* at 6 (congressional power "extends only to those measures necessary to make the * * * regulation [of an interstate market] effective"). Regulation of homegrown marijuana was necessary and proper to the regulation of the national market in that "fungible commodit[y]" because homegrown marijuana for personal use "is never more than an instant from the interstate market." *Id.* at 8. No such justification exists for a federal ban on takes of the cave insects, an issue that Texas has explained it is willing and perfectly able to address itself. See Brief of the States of Texas et al. as *Amici Curiae* 13-15.

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[1] For example, the prohibition on taking economic species (*e.g.*, species that are or have been commodities) would continue to be enforceable to supplement the other provisions of 16 U.S.C. § 1538, which outlaw the market for such species. Because there is no market for intrastate non-economic species, however, there is no need to regulate takes of such species under the Commerce Clause in order to avoid "undercut[ting] the regulation of the interstate market in that [species]." *Raich*, slip op. 15.

4. Congress's ESA findings—unlike those in *Raich*, which addressed "the effects of intrastate drug activity on interstate commerce" (slip op. 18 n.32)—do not explain "why Congress deemed it appropriate to encompass local activities within the scope of the [statute]." *Id.* at 17. In the ESA, Congress found that species "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that such species "are of esthetic, ecological, educational, historical, recreational, and scientific value." 16 U.S.C. § 1531(a)(1), (3). It made no findings whatsoever that the activity regulated by 16 U.S.C. § 1538(a)(1)(B)—"takes" of endangered species—substantially affects interstate commerce. Nor is there any legislative history supporting that conclusion. See Pet. 16.

Furthermore, the findings Congress did make do not focus on the economic or commercial value of endangered species, let alone separately justify reaching intrastate non-economic species traditionally within the regulatory power of the states. While there is no doubt that there exist markets in some endangered species—such as for bald eagles and their parts (*Raich*, slip op. 23 n.36)—Congress's complete failure to refer to such trade in its findings suggests that it did not consider the economic uses of some species to be the basis of its power to enact the ESA's broad prohibition on "taking" such species. Instead, Congress chose to enact separate ESA provisions that explicitly prohibit commerce in endangered species. See Pet. 19 n.7. Those provisions are not at issue here.

This Court has now confirmed that the correct Commerce Clause inquiry—which Congress did not address in its findings—is whether the expressly regulated activity itself "substantially affect[s] interstate commerce." *Raich*, slip op. 13, 16; *id.* at 4 (Scalia, J., concurring in judgment) (whether intrastate activity substantially "interfere[s] with or obstruct[s] the exercise of the [commerce] power"); see Pet. 23-27; Pet.

App. 21-23; Reply Br. 6-7, 9. In this case, the answer to that question is no. The regulated activity is takes of endangered species. Pet. App. 22. As discussed above, takes of cave insects and other intrastate non-economic species do not themselves affect commerce or obstruct an exercise of the commerce power. Congress made no findings to the contrary.

5. Finally, the Court's careful analysis in *Raich* looks nothing like either the Fifth Circuit's reasoning below (aggregating all takes of all endangered species based on a speculative "interdependence of species" analysis, Pet. App. 35) or the D.C. Circuit's reasoning in *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (focusing on the economic activity that resulted in the take). The confusion we described in the petition and reply brief—the circuits' express disagreement on the appropriate method of Commerce Clause analysis, the well-reasoned dissents from respected jurists in every case, and the very closely divided vote to deny *en banc* rehearing here—is unaffected by the Court's decision in *Raich*. The inconsistency of the ruling below with this Court's analysis in *Raich*, *Lopez*, *United States* v. *Morrison*, 529 U.S. 598 (2000), and other controlling precedents is striking, and the blow to our Nation's federalist principles from leaving the decision below unreviewed would be severe. Thus, the need for this Court's immediate intervention remains just as dire, as the numerous *amicus* briefs urging that certiorari be granted attest.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and reply brief, the Court should grant the petition and decide this case on the merits. Alternatively, the Court should grant the petition, vacate the judgment, and remand this case for reconsideration in light of *Raich*.

Respectfully submitted.

TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

J. BRETT BUSBY
MAYER, BROWN, ROWE & MAW LLP
700 Louisiana Street
Houston, TX 77002
(713) 221-1651

PAUL M. TERRILL, III
Counsel of Record
VINCENT L. HAZEN
HAZEN & TERRILL, P.C.
810 W. 10th Street
Austin, TX 78701
(512) 474-9100

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